

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SCOTT'S TRUCKING LLC,

Plaintiff,

V.

NAVISTAR, INC.,

Defendant.

CASE NO. C20-1841-RSM

**ORDER GRANTING DEFENDANT
NAVISTAR'S MOTION TO DISMISS**

I. INTRODUCTION

This matter comes before the Court on Defendant Navistar, Inc. (“Navistar”)’s Motion to Dismiss. Dkt. #50. Plaintiff has filed a response opposing Navistar’s Motion. Dkt. #60. The Court finds oral argument unnecessary to resolve the relevant issues. Having reviewed Defendant’s Motion, Plaintiff’s Response, Defendant’s Reply, and the remainder of the record, the Court GRANTS Defendant Navistar’s Motion to Dismiss.

II. BACKGROUND

Plaintiff Scott's Trucking, LLC initiated this action against Navistar on August 18, 2016 in the U.S. District Court for the Northern District of Texas related to Plaintiff's purchase of seven semi-trucks produced and manufactured by Navistar between September 2011 and August 2013.

1 Dkt. #1. Plaintiff's complaint alleges breach of express and implied warranty, breach of contract,
 2 fraud, and unconscionability.

3 On September 9, 2016, the U.S. Judicial Panel on Multidistrict Litigation ("the Panel")
 4 issued a conditional transfer order of this action to the Honorable Joan B. Gottschall, U.S. District
 5 Judge for the Northern District of Illinois, on the basis that Plaintiff's action appeared to involve
 6 questions of fact common to twenty-three actions previously transferred to that court as part of a
 7 multidistrict litigation ("MDL"). Dkt. #4. On October 2, 2020, the Panel issued a conditional
 8 remand order of this action back to the Northern District of Texas due to completion of pretrial
 9 proceedings in the MDL. Dkt. #21. Since the 2016 initiation of the case in the Northern District
 10 of Texas through the four years the case was pending in the Northern District of Illinois, Plaintiff
 11 never requested a summons or attempted to serve Navistar.

12 On October 23, 2020, after the case was remanded back to the Northern District of Texas,
 13 Navistar moved to dismiss Plaintiff's complaint for failure to serve, lack of jurisdiction, and failure
 14 to state a claim. Dkts. #26, #27. Plaintiff responded by requesting (1) additional time to serve
 15 Navistar under Rule 4(m); (2) leave to file a proposed amended complaint; and (3) an order
 16 transferring this action to the U.S. District Court for the Western District of Washington. Dkt.
 17 #31. On December 21, 2020, the Northern District of Texas district court concluded that it lacked
 18 personal jurisdiction over Navistar and transferred the action to this Court pursuant to 28 U.S.C.
 19 §1406(a). Dkt. #35. Although Navistar argued that dismissal was appropriate given that Plaintiff's
 20 claims would be time-barred under Washington law, the Northern District of Texas district court
 21 concluded that transfer was appropriate to allow the transferee court "to address in the first instance
 22 Navistar's arguments in this respect (i.e., the request of Scott's for additional time to serve Navistar
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1 and whether the claims of Scott's are barred by limitations), and whether Scott's has stated a claim
 2 on which relief can be granted.” *Id.* at 8.

3 On January 27, 2021, Navistar filed a renewed motion to dismiss Plaintiff’s claims pursuant
 4 to Rules 12(b)(5), 12(b)(6), and 4(m) on the basis that (1) Plaintiff’s claims are time-barred; and
 5 (2) Plaintiff failed to serve Navistar under Rule 4(m) without good cause for extension. Dkt. #50.

6 III. DISCUSSION

7 A. Legal Standards

8 A motion for insufficient service of process may be brought under Rule 12(b)(5). Fed. R.
 9 Civ. P. 12(b)(5). Rule 4(m) states, “[i]f a defendant is not served within 90 days after the complaint
 10 is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action
 11 without prejudice against that defendant or order that service be made within a specified time. But
 12 if the plaintiff shows good cause for the failure, the court must extend the time for service for an
 13 appropriate period.” Fed. R. Civ. P. 4(m).

14 In making a 12(b)(6) assessment, the court accepts all facts alleged in the complaint as
 15 true and makes all inferences in the light most favorable to the non-moving party. *Baker v.*
Riverside County Office of Educ., 584 F.3d 821, 824 (9th Cir. 2009) (internal citations omitted).
 16 However, the court is not required to accept as true a “legal conclusion couched as a factual
 17 allegation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550
 18 U.S. 544, 555 (2007)). The complaint “must contain sufficient factual matter, accepted as true,
 19 to state a claim to relief that is plausible on its face.” *Id.* at 678. This requirement is met when
 20 the plaintiff “pleads factual content that allows the court to draw the reasonable inference that the
 21 defendant is liable for the misconduct alleged.” *Id.* The complaint need not include detailed
 22 allegations, but it must have “more than labels and conclusions, and a formulaic recitation of the
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1 elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. Absent facial plausibility,
 2 a plaintiff’s claims must be dismissed. *Id.* at 570.

3 **B. Statute of Limitations Period**

4 In cases where jurisdiction is based on diversity, the applicable statute of limitations
 5 period and whether it is tolled is governed by state law under *Erie v. Tompkins*, 304 U.S. 64
 6 (1938). *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 532 (1949). Where a
 7 case is transferred due to lack of personal jurisdiction, “since the law of the transferee forum
 8 should govern whenever personal jurisdiction is lacking in the transferor court, the tolling rules
 9 of the state in which the transferee court sits ought to control.” *Transfer in the Federal Courts in*
 10 *the Absence of Personal Jurisdiction*, 61 Colum. L. Rev. 902, 915 (1961). Parties appear to agree
 11 that Washington law governs the statute of limitations for Plaintiff’s claims and the conditions
 12 for tolling that limitations period.

13 Washington law applies a four-year statute of limitations to breach of contract for sale and
 14 breach of warranty claims, and a three-year statute of limitations period to fraud claims. *See*
 15 RCW 62A.2-725; RCW 4.16.080(4). RCW 4.16.170 establishes when and under what
 16 circumstances statutes of limitations are tolled under Washington law:

17 For the purpose of tolling any statute of limitations an action shall be deemed
 18 commenced when the complaint is filed or summons is served whichever occurs
 19 first. If service has not been had on the defendant prior to the filing of the complaint,
 20 the plaintiff shall cause one or more of the defendants to be served personally, or
 21 commence service by publication within ninety days from the date of filing the
 22 complaint. If the action is commenced by service on one or more of the defendants
 23 or by publication, the plaintiff shall file the summons and complaint within ninety
 24 days from the date of service. *If following service, the complaint is not so filed, or*
following filing, service is not so made, the action shall be deemed to not have been
commenced for purposes of tolling the statute of limitations.

RCW 4.16.170 (emphasis added). Thus, in order to toll the limitations period under Washington
 law, “two things must occur: (1) either the defendant is served with a summons or the complaint

1 is filed, and (2) if the defendant is served first, the complaint must be filed within 90 days of
 2 service or if the complaint is filed first, at least one defendant is served within 90 days from the
 3 date on which the complaint was filed.” *Ursal v. Amazon.com Inc.*, No. 19-CV-1701-BJR, 2020
 4 WL 2733755, at *2 (W.D. Wash. May 26, 2020).

5 Accordingly, to toll the three-year and four-year limitations periods for its claims, Plaintiff
 6 was required to serve Navistar within 90 days. *See O’Neil v. Farmers Ins. Co. of Wash.*, 125 P.3d
 7 134, 137 (Wash. Ct. App. 2004) (citations omitted) (“Washington courts have repeatedly held
 8 that the filing of a complaint does not constitute the commencement of an action for the purpose
 9 of tolling the statute of limitations. It is still necessary for the plaintiff to serve a defendant within
 10 90 days of the date of filing in order for the commencement to be complete.”); *McCarthy v.*
 11 *Farwell*, 2012 WL 10390, *2 (W.D. Wash. January 3, 2012) (“Washington law specifically states
 12 that if service is not made within ninety days of filing of the complaint, ‘the action shall be deemed
 13 to not have been commenced for purposes of tolling the statute of limitations.’”) (quoting RCW
 14 4.16.170). Parties agree that Plaintiff filed this complaint on August 18, 2016. Dkt. #1. Parties
 15 likewise agree that, to this day, Plaintiff has failed to serve Navistar. *See* Dkt. #60 at 7 (“Navistar
 16 is correct that, through the inadvertence of counsel, Plaintiff has not yet served Navistar with
 17 process.”). However, Plaintiff contends that Navistar waived its failure to serve argument by
 18 participating in the MDL without raising the service issue. Alternatively, Plaintiff argues that the
 19 Court should exercise its discretion to grant Plaintiff additional time to effect service. The Court
 20 will address each argument in turn.

21 *i. Navistar’s Waiver of Improper Service Defense*

22 Plaintiff relies on two Washington cases to support its proposition that Navistar waived
 23 its limitations defense by participating in the MDL. In *Blankenship v. Kaldor*, the Washington
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1 Court of Appeals concluded that a defendant that had actively participated in discovery had
 2 waived the defense of inadequate service, given that it “had the necessary facts within its control
 3 to make the critical assessment (regarding inadequate service) and failed to act earlier . . .”). 114
 4 Wn. App. 312, 318, 57 P.3d 295, 298–99 (2002). The Washington Supreme Court reached a
 5 similar conclusion in *Lybbert v. Grant Cnty*, where it determined that a defendant was precluded
 6 from asserting the defense of insufficient service of process after it failed to plead the defense in
 7 its answer or other responsive pleading before proceeding with discovery. 141 Wn.2d 29, 44–45
 8 (2000).

9 Both cases are distinguishable from the instant case. *Blankenship* and *Lybbert* addressed
 10 instances where plaintiffs attempted—albeit unsuccessfully—to effect proper service on the
 11 defendant. In *Blankenship*, the plaintiff mistakenly served the defendant’s father rather than the
 12 defendant. See 114 Wn. App. at 315. Similarly, in *Lybbert*, the plaintiff served the administrative
 13 assistant to the county commissioners as opposed to the county auditor. See 141 Wn.2d at 32.
 14 Here, Plaintiff’s failure to serve is not based on a flaw in its efforts to serve defendants, but rather
 15 a failure to request summons and attempt service altogether. Plaintiff was therefore not dependent
 16 on any “facts within [defendant]’s control” to be made aware of its service deficiency. Cf.
 17 *Blankenship*, 114 Wn. App. At 318. On the contrary, both parties were equally apprised of the
 18 Federal Rules of Civil Procedure requiring service of summons within 90 days. See Fed. R. Civ.
 19 P. 4(m).

20 Furthermore, the defendants in *Blankenship* and *Lybbert* sought discovery from the
 21 plaintiff before raising the insufficient service issue. In *Lybbert*, the defendant waited until after
 22 the statute of limitations expired to respond to interrogatories designed to ascertain whether it
 23 would assert an improper service defense. See 141 Wn.2d at 42. Likewise, in *Blankenship*, both

1 parties propounded interrogatories and requests for production. *See* 114 Wash. App. At 319.
 2 Here, Plaintiff argues that Navistar “participated for four years in the MDL, answering discovery,
 3 engaging in motion practice, participating in multiple conferences, and advising the MDL court
 4 about this specific case in multiple status reports” Dkt. #60 at 5. However, Plaintiff does not
 5 dispute that Navistar never sought case-specific discovery from Plaintiff, nor visa versa. Upon
 6 transfer of the case from the MDL back to the Northern District of Texas, Navistar timely raised
 7 both the personal jurisdiction and improper service defenses in accordance with the filing deadline
 8 for responsive pleadings. *See* Dkt. #29 at 56. Based on these distinguishing facts, the Court
 9 cannot conclude that Navistar’s failure to apprise Plaintiff before or during the MDL proceedings
 10 of its obligations to effect service on Navistar amounts to “dilatory” action constituting a waiver
 11 of the defense. Nor can the Court conclude that Navistar’s actions amount to an attempt “to lie
 12 in wait, making by misnomer its contention that service of process has been insufficient, and then
 13 obtain a dismissal on that ground only after the statute of limitations has run, thereby depriving
 14 the plaintiff of the opportunity to cure the service defect.” *Cf. Lybbert*, 141 Wash. 2d at 40. Here,
 15 there was no “lying in wait” or “misnomer” by Navistar—rather, Plaintiff neglected a key step in
 16 case initiation by failing to request or serve summons. That fault lies with Plaintiff, not Navistar.

17 Plaintiff also relies on two federal cases to support its argument that Navistar waived its
 18 improper service defense: *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1318 (9th Cir. 1998),
 19 and *Datskow v. Teledyne, Inc., Cont'l Products Div.*, 899 F.2d 1298 (2d Cir. 1990). Plaintiff
 20 appears to rely on *Peterson* for its holding that “most defenses, including the defense of lack of
 21 personal jurisdiction, may be waived as a result of the course of a conduct pursued by a party
 22 during litigation.” *Peterson*, 140 F.3d at 1319. However, the Ninth Circuit in that case ultimately
 23 concluded that the defendant preserved the issue for appeal by raising it in a timely motion to

1 dismiss. *Id.* To the extent that Plaintiff argues that Navistar’s participation in the MDL amounts
 2 to “sandbagging” or “deliberate, strategic behavior” that would constitute a waiver of the
 3 improper service defense, *id.* at 1318, it fails to provide any support for its proposition. Navistar
 4 was under no obligation to inform Plaintiff’s counsel of its service obligations under Rule 4(m),
 5 and the Court declines to find that Navistar’s failure to inform Plaintiff of that obligation during
 6 the MDL amounts to behavior warranting waiver.

7 *Datskow* is likewise distinguishable from the facts at issue here. In that case, the Second
 8 Circuit considered a defendant’s improper service defense raised in its first responsive pleading,
 9 where the defendant previously attended a scheduling conference and “participated in scheduling
 10 discovery and motion practice” without raising the issue of defective service. *Datskow*, 899 F.2d
 11 at 1303. The court concluded that the defendant was barred from raising improper service given
 12 that the limitations period had not run at the time of the scheduling conference, and “it would
 13 have been simple of plaintiffs to have made personal service on the defendant if the point had
 14 been mentioned.” *Id.* Yet the service deficiency at issue in *Datskow* was the fact that plaintiff
 15 had served holding company “Teledyne, Inc.” rather than its subsidiary, “Teledyne Industries,
 16 Inc.” *Id.* at 1300–01. Acknowledging that “the Teledyne family of companies . . . operate under
 17 confusingly similar names,” the Second Circuit concluded that defendant’s service defense
 18 challenged “the form of the service,” and defendant had waived such a defense based on its
 19 participation in the case. *Id.* at 1303–04. These facts are distinguishable from the present case,
 20 where Plaintiff failed to make any effort to serve Navistar because of “inadvertence of counsel.”

21 Dkt. #60 at 7.

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1 For these reasons, the Court finds that none of the cases relied upon by Plaintiff support
 2 its argument that Navistar waived its improper service defense by failing to apprise Plaintiff of
 3 its service obligations during the MDL.

4 **C. Extension of Time to Serve**

5 Having concluded that Navistar did not waive its improper service defense, the Court turns
 6 to Plaintiff's alternative argument: a request for an extension of the deadline to serve Navistar.
 7 Dkt. #60 at 7-10. Citing this Court's broad discretion to grant an extension of time, Plaintiff urges
 8 this Court to extend the 90-day deadline—at this point by more than 1600 days—on the basis that
 9 Navistar will not be prejudiced by an extension whereas Plaintiff may be barred from re-filing the
 10 case due to the statute of limitations. The Court does not dispute that a plaintiff “is greatly
 11 prejudiced when the statute of limitations would prevent re-filing of the action.” *Wickersham v.*
 12 *Washington*, C13-1778-JCC, 2014 WL 3846094, at *3 (W.D. Wash. Aug. 5, 2014). Yet a court's
 13 discretion to extend the time for service under Rule 4(m) “is not limitless.” *Walker v. City of*
 14 *Renton*, No. C11-2114 RAJ, 2013 WL 2285958, at *1 (W.D. Wash. May 23, 2013). In
 15 considering whether an extension is warranted in the absence of good cause, courts in the Ninth
 16 Circuit have considered several factors: the delay in service, eventual service, the explanation for
 17 the delay, whether the defendant attempted to evade service or contributed to the delay, whether
 18 the defendant would be prejudiced, a statute of limitations bar, and actual notice of the lawsuit.
 19 *Id.; Efaw v. Williams*, 473 F.3d 1038, 1041 (9th Cir. 2007).

20 Only two factors weigh in favor of granting an extension of Plaintiff's time to serve:
 21 Navistar's actual notice of the lawsuit and the possibility that the statute of limitations may bar
 22 Plaintiff from re-filing the action.¹ The remaining factors weigh against an extension of time. At
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24 ¹ Plaintiff does not concede that it would be barred from re-filing its claim. See Dkt. #60 at 10, n.2.

1 this point, the delay in service is several years past the deadline since Plaintiff has yet to serve
 2 Navistar. Plaintiff's explanation for the delay is also exceptionally weak. Plaintiff concedes that
 3 its failure to request summons, let alone serve the complaint, is due to counsel's inadvertence.
 4 Parties agree that Navistar neither attempted to evade service nor contributed to the delay.
 5 Furthermore, while Plaintiff argues that Navistar has suffered no prejudice due to its failure to
 6 serve, the Court disagrees. This case has been pending for more than five years, at which point
 7 evidence has grown stale and witnesses' memories have faded. While much of the delay was
 8 caused by the case's transfer and remand from the MDL, additional delay following remand was
 9 due, in part, to Plaintiff's service deficiency, which led the Northern District of Texas district
 10 court to transfer the case rather than address Navistar's arguments for dismissal. *See* Dkt. #35 at
 11 8. With no further explanation for this deficiency beyond counsel's "inadvertence," the Court is
 12 not compelled to exercise its discretion and grant Plaintiff relief in this instance.

13 Finally, regarding the statute of limitations issue, Washington courts have strictly applied
 14 RCW 4.16.170 such that failure to serve the defendant within 90 days warrants dismissal of the
 15 action—notwithstanding expiration of the limitations period. *See, e.g., Giddings v. Greyhound*
16 Lines, Inc., No. C11-1484-RSM, 2013 WL 4458239 (W.D. Wash. Aug. 16, 2013) *rev'd on other*
17 grounds 609 Fed. Appx. 457 (9th Cir. 2015) (finding insufficient evidence of plaintiff's alleged
 18 mental disability to support equitable tolling argument); *McCarthy*, 2012 WL 10390 at *2
 19 (dismissing claims as time-barred where defendants failed to return waivers of service and
 20 plaintiff provided no authority that defendants were required to return such waivers); *Whibdee v.*
21 Pierce Cnty., 857 F.3d 1019, 1021 (9th Cir. 2017) ("Washington courts require strict compliance
 22 with the state's service of process requirements."). Plaintiff argues that *McCarthy* is inapplicable
 23 here, given that the defendant in that case filed a notice of appearance, reserved "all rights
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1 including those relating to service,” and promptly moved for summary judgment for failure to
2 serve. *See* 2012 WL 10390, at *1. The Court disagrees. This case bears more similarity to
3 *McCarthy* than *Blankenship* and *Lybbert*, given that Navistar promptly raised the service issue as
4 required by the MDL court’s scheduling order setting the deadline for responsive pleadings. *See*
5 Dkt. #29 at 56. While Plaintiff insists that Navistar’s failure to raise the service issue earlier
6 amounts to gamesmanship, it provides no support for its proposition. Accordingly, the Court
7 finds that the factors weigh against granting Plaintiff an extension of time to effect service.

8 For the foregoing reasons, the Court concludes that Navistar did not waive its improper
9 service defense through its participation in the MDL. Nor is an extension of Plaintiff’s time to
10 serve Navistar sufficiently justified. Accordingly, under Washington law, the three-year and four-
11 year statute of limitations periods for Plaintiff’s claims were not tolled for the pendency of this
12 action. Plaintiff’s claims are therefore dismissed as time-barred. *McCarthy*, 2012 WL 10390, at
13 *2.

14 **IV. CONCLUSION**

15 Having reviewed Defendant’s Motion, Plaintiff’s Response, Defendant’s Reply, and the
16 remainder of the record, it is hereby ORDERED that Defendant’s Motion to Dismiss, Dkt. #50,
17 is GRANTED. This matter is CLOSED.

18 DATED this 7th day of September, 2021.
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20 
21 RICARDO S. MARTINEZ
22 CHIEF UNITED STATES DISTRICT JUDGE
23